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No. 89-601

IN THE

Supreme Court of the United States

October Term 1989

GENE McNARY, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, et al.,

Petitioners,

vs.

MARIE LUCIE JEAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE NATIONAL IMMIGRATION PROJECT, THE NATIONAL LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE ASIAN LAW CAUCUS, AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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No. 89-601

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1989

Gene McNary, Commissioner of the Immigration and Naturalization Service, et al.,

Petitioners,

vs.

Marie Lucie Jean, et al.,

Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For the Eleventh Circuit

Brief of The National Immigration Project, The National Lawyers Committee For Civil Rights Under Law, The Mexican American Legal Defense and Educational Fund, The Asian American Legal Defense and Educational Fund, The Asian Law Caucus, and The American Civil Liberties Union As Amici Curiae Supporting Respondents

INTEREST OF AMICI

Amici curiae, the National Immigration Project, the National Lawyers Committee for Civil Rights Under Law, the Mexican American Legal Defense and Educational Fund, the Asian American Legal Defense and Educational Fund, the Asian Law Caucus, and the American Civil Liberties Union, submit the following brief in support of respondent. Amici have obtained the consents of both parties to this action and those consents have been filed with the Clerk of this Court.

Amici are national organizations working in the area of public interest and immigration law. All amici enlist the services of volunteer lawyers to represent parties in order to seek review of or defend against challenged governmental action. Amici, with the assistance of volunteer lawyers, regularly represent both individuals and classes on a pro bono publico basis, not only to redress individual acts of injustice, but also to promote important public policy concerns, including the fairness and even-handedness of government conduct and the rule of law.

In this connection, amici regularly make applications for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987). The availability of fees under EAJA and other fee-shifting statutes allows amici to continue their work. Recovery of attorney fees under EAJA and other fee-shifting statutes constitutes a significant portion of the annual budgets of

amici. Although amici are able to obtain lawyers who volunteer to represent many clients on a pro bono basis, the availability of attorney fees under EAJA is an important factor in the decision to undertake such representation. Many individual practitioners and law firms would be unwilling to shoulder the burdens of public interest litigation for amici at the trial and appellate levels if there were no possibility of securing attorney fees.

Amici curiae believe that EAJA's purposes are best fulfilled by allowing successful fee applicants to obtain fees for fee litigation without requiring a court to make a separate inquiry into whether the government's opposition in the fee litigation was substantially

justified. Resolution of this has a significant effect on many organizations and individuals, like amici, who litigate to redress injustice and promote the broader aims of EAJA.

SUMMARY OF ARGUMENT

EAJA's purposes -- to facilitate challenges to arbitrary governmental action and to promote governmental accountability -- are best fulfilled by allowing prevailing parties to recover fees for fee litigation without a separate tangential inquiry into whether the government's position in the fee litigation was substantially justified. The policies embodied by EAJA are best served by a rule which would give fee applicants fees for fee litigation when it is determined that the government's position in

the main litigation was without substantial justification.

The language and legislative history of EAJA so dictate. Congress specifically rejected an approach that would focus on the justification of the government's opposition to fees because it would penalize those who successfully challenge unreasonable government conduct by making successful recovery of fees contingent upon a demonstration that the government was unreasonable in opposing fees.

A 1985 amendment to EAJA makes clear that courts are not to analyze whether the government's position in separate phases of the litigation was substantially justified in making fee determinations. Under EAJA the government is

liable for fees for the fee litigation if it is found that the underlying acts giving rise to the litigation were without substantial justification.

The rule urged by petitioners, which would require the court to analyze whether the government's position in the fee litigation was substantially justified, would run counter to the provisions and purposes of EAJA by necessitating a separate evidentiary determination related only to the fees litigation. EAJA rejects this approach and requires courts instead to examine only the record developed in the underlying proceedings.

The rule adopted by the courts below best satisfies the important policy concerns embodied in EAJA. Having al-

ready successfully challenged unreasonable government conduct, EAJA fee applicants should not be made to shoulder the additional burden of another round of litigation on the justification for the government's position regarding an award of fees. This Court should affirm the ruling of the trial court which avoids the nightmarish prospect of an indefinite round of litigation on fee matters by awarding fees for fee litigation without a separate inquiry into whether the government's position in the fee litigation was without substantial justification.

ARGUMENT

I.

AWARDING FEES FOR AN EAJA FEE LITIGATION DOES NOT REQUIRE A COURT TO DECIDE WHETHER THE GOVERNMENT'S POSITION IN THE FEE LITIGATION WAS SUBSTANTIALLY JUSTIFIED.

EAJA was passed in order to reduce the "disparity between the resources and expertise" of individuals or small business challenging government action and the government "by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified." H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 5, reprinted in 1980 U.S. Code Cong. & Admin. News 4984.

EAJA and other fee-shifting statutes represent a departure from the "American Rule" on attorney fees under which each party bears his own attorney fees. EAJA's allowance of fee-shifting is founded "on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy." Id. at 4988.

To that end, EAJA states that

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. §2412(d)(1)(A).

As is the case with other fee-shifting statutes, such as the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, courts regularly award reasonable fees to prevailing parties under EAJA for litigating attorney fee claims. See, e.g., Cinciarelli v. Reagan, 729 F.2d 801, 809 (D.C. Cir. 1984). Courts have consistently held that the award of fees for fee litigation is consonant with the fundamental purpose of EAJA: "ensur[ing] that persons aggrieved by unreasonable governmental actions are not prevented from vindicating their claims by the potentially high costs involved in doing so."

Trichilo v. Secretary of Health and Human Services, 823 F.2d 702, 707 (2nd Cir. 1987) ("Trichilo I").

In order to recover fees under EAJA, the government's position in the underlying action must be determined to be without substantial justification. It follows from this standard, which focusses on the unreasonable activity of the government giving rise to the litigation, that the fee award results because the litigation proceeds directly from the government's conduct. An EAJA fee applicant who confronts litigation over recovery of fees has been brought to that pass only because the government, by acts found to be without substantial justification, has forced him to litigate. As the Second Circuit noted in

Trichilo I, "[s]ince the statute primarily assures prevailing plaintiffs their reasonable attorney's fees, it would be ironic if claiming those very fees -- which would have been unnecessary if not for the governmental action -- was the one act for which a claimant could not receive compensation." 823 F.2d at 707.

The majority of the courts of appeal which have considered the question have held that fees should be awarded if the court finds that the government's "position" in the underlying agency action or litigation arising from that action was not "substantially justified".[1]

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1. Five circuits have adopted this approach: see Trichilo I, 823 F.2d (continued...)

Under the approach taken by the courts below, a separate inquiry into the justification of the government's position in the fee litigation is unnecessary. If the government's conduct leading to the underlying litigation was not substantially justified, a successful fee applicant should not be forced into

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1.(...continued)
702 (2nd Cir. 1987); Cinciarelli, 729 F.2d 801 (D.C. Cir. 1984); Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988); Powell v. Commissioner, 891 F.2d 1167 (5th Cir. 1990); and McDonald v. Secretary of Health and Human Services, 884 F.2d 1468 (1st Cir. 1989). Four circuits have, to some extent, adopted the rule espoused by petitioners. See Cornella v. Schweiker, 741 F.2d 170 (8th Cir. 1984); Continental Web Press, Inc. v. N.L.R.B., 767 F.2d 321, 324 (7th Cir. 1985); Russell v. Heckler, 814 F.2d 148, 155 (3rd Cir. 1987), vacated on other grounds, 108 S. Ct. 2891 (1988); National Wildlife Federation v. Federal Energy Regulatory Comm'n, 870 F.2d 542 (9th Cir. 1989).

another round of litigation on the further question of whether the government's fee opposition was substantially justified. This rule avoids the "Kafkaesque judicial nightmare" that would result from the "distinct possibility of an infinite regression of EAJA litigation", Cinciarelli, 729 F.2d at 810.

In contrast, under the rule suggested by petitioners, the government would be allowed to proliferate litigation over fees in which successful EAJA plaintiffs would be captives, so long as it put forth substantial justification arguments. Following the rule advocated by the government would violate this Court's admonition that "a 'request for attorney's fees should not result in

a second major litigation.'" Pierce v. Underwood, 108 S. Ct. 2541, 2549 (1988), quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

A. The Statutory Language and Legislative History of EAJA Do Not Require A Separate Determination Whether The Government's Position In The Fee Litigation Was Substantially Justified.

1. The government's litigation position should not be examined in isolation.

In order to award fees under EAJA to a prevailing party, a court must determine whether the "position" of the government was substantially justified. Originally passed in 1981, EAJA was made permanent in 1985.[2] Among the amendments

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2. EAJA, which originally took effect on October 1, 1981, contained a "sunset provision" which caused the (continued...)

included in the permanent version of EAJA was a definition of the term "position of the United States" which now embraces not only the "position taken by the United States in the civil action", but also "the action or failure to act by the agency upon which the civil action is based". 28 U.S.C. §2412(d)(2)(D). For the legislative history of the 1985 amendments to EAJA see H.R. Rep. No. 99-120, Part I, 99th Cong., 1st Sess. 4,

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2.(...continued)
act to expire on September 30, 1984. On November 9, 1984, Congress passed a new version of EAJA, which made the act permanent and added certain amendments. The 1984 version of EAJA was vetoed by the President on November 9, 1984. See 1985 U.S. Code Cong. & Admin. News at 133-34. In 1985 Congress passed a new version of EAJA, which made the act permanent and made several amendments which took account of the reason for the President's veto. Id.

reprinted in 1985 U.S. Code Cong. & Admin. News 132.

The definition of "position of the United States" included by Congress in the 1985 version of EAJA, which explicitly incorporates the underlying agency action, clarifies a matter which had led to "much confusion as to the proper scope of an EAJA proceeding". 1985 U.S. Code Cong. & Admin. News at 140. The new definition indicates that Congress explicitly rejected the approach taken by some courts, which focussed not "on the unjustified government activity that formed the basis of the litigation," but unduly on the government's position in the litigation. Id.

The statutory definition, as well as its legislative history, make clear that

courts are not to focus on the government's litigation stance in isolation. Such a narrow focus would allow the government to

> insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed "reasonable" litigation positions, thereby having the effect of substantially justifying [the government's] position. Interpreting the EAJA so as to restrict its application to mere litigation arguments and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that Congress hoped to create in 1980 [in passing EAJA].

Id. at 141, citing Environmental Defense Fund v. Watt, 554 F. Supp. 36, 41 (E.D.N.Y. 1982) and National Resources Defense Council v. E.P.A., 703 F.2d 700, 710 (3rd Cir. 1983). It was the intent of Congress "to provide attorneys' fees

when an unjustifiable agency action forces litigation, and the agency then rides to avoid such liability by reasonable behavior during the litigation." 1985 U.S. Code & Cong. Admin. News at 180.

Petitioners' approach, which would require such a separate analysis of the fee phase of the litigation, is not only inconsistent with the language and legislative history of EAJA, but would also promote waste of judicial resources. Requiring a court to examine the justification for the government's opposition to fees at the fee stage of the litigation would be

> inappropriate in view of th[e] congressional mandate to look not at the government's litigation position, but rather at the underlying action that spawned the litigation in the

> first place. Were the government's litigation position the sole criterion for the award of fees, it might be justified to look at different phases of the litigation separately to determine whether the litigation position in each phase was "substantially justified". But since the litigation position is no longer the relevant criterion, there is no reason to divide up phases of the litigation for examination. In short, if the underlying agency action was not substantially justified, the victim of that unjustified action is entitled to all reasonable attorney's fees, including those incurred on the fee application.

Trichilo I, 823 F.2d at 708. See also Russell v. Heckler, 814 F.2d 148, 155 (3rd Cir. 1987); Haitian Refugee Center v. Meese, 791 F.2d 1489, 1500-01 (11th Cir.), vacated, 804 F.2d 1573 (11th Cir. 1986); Lee v. Johnson, 801 F.2d 115, 116 (3rd Cir. 1986) (Becker, J., dissenting); Powell v. Commissioner, 891 F.2d 1167,

1170 (5th Cir. 1990); Trichilo v. Secretary of Health and Human Services, 832 F.2d 743, 745 (2nd Cir. 1987) ("Trichilo II") ("[C]ongress has made clear that it is inappropriate to examine separate parts of the litigation to determine whether the government's position in each phase was justified.")[3]

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3. Petitioner's recitation (Br. at 14-16) of the principle that EAJA should be strictly construed because it is a waiver of sovereign immunity does not diminish the force of this interpretation of EAJA. As this Court noted in Ruckelshaus v. Sierra Club, 463 U.S. 680, 686 (1983), cited in Library of Congress v. Shaw, 478 U.S. 310, 318 (1986), the key inquiry in the case of statutes waiving sovereign immunity is whether "a fair reading of the language of the [statutory] section requires" the United States to be subject to suit. In Sierra Club, this Court noted that there must be "explicit language" in a statute waiving sovereign immunity in order to support a "truly radical depar-

(continued...)

2. Consideration of whether the government's fee position was substantially justified would contravene EAJA by requiring the court to make a separate evidentiary determination.

Requiring a court to analyze whether the government's position in the fee litigation was substantially justified would also contravene a provision of EAJA

3.(...continued)
ture" from established practice. 463 U.S. at 685 n.7. Applying the principle enunciated in Sierra Club in the Shaw case, this Court rejected the argument that a successful EAJA fee applicant should be given interest on fee awards, because it found no language in EAJA to support a departure from the well established principle of the government's traditional immunity from interest. This case represents a much different situation than Library of Congress. Granting fees for fee litigation without making a separate inquiry into whether the government's position is substantially justified does not represent a "radical departure" from established principles, but instead is well supported by the statutory language.

which directs that the determination of whether the government's position was substantially justified should be made "on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought." 28 U.S.C. § 2412(d)(1)(B).

Congress added this provision in 1985 because of concerns expressed by the President in his veto of the 1984 version of EAJA. The President noted that one of the bases of his disapproval of the 1984 version of EAJA was that it required courts to make a separate evidentiary determination in order to decide whether the position of the United States was

substantially justified. He disapproved of this approach because it "would result in needless and wasteful litigation over what is supposed to be a subsidiary issue, the award of attorneys' fees, and would further burden the courts, which would have to hear the claims in each case not once, but twice." See Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. Pres. Doc. 1814-15 (Nov. 8, 1984).

Congress, mindful of the President's veto of the 1984 version of the EAJA, included the present 28 U.S.C. §2412(d)(1)(B) in 1985 in order to "limit the determination of whether the position of the United States was substantially justified to the record (including the record with respect to the action or

failure to act by the agency upon which the adversary adjudication or civil action is based) which is made in the adversary adjudication or civil action for which fees and other expenses are sought." 1985 U.S. Code Cong. & Admin. News at 135.

Congress further noted that "the evaluation of the government's position will be straightforward, since the parties will have already aired the facts that led the agency to bring the action. No additional discovery of the government's position will be necessary, for EAJA petition purposes." Id. at 141, citing Dougherty v. Lehman, 711 F.2d 555, 561-62 (3rd Cir. 1983). See also L. Hill, "An Analysis and Explanation of the

Equal Access to Justice Act," 19 Ariz. St. L. J. 229, 237-41 (1987).

Under 28 U.S.C. §2412(d)(1)(B) a court's determination of whether the government's position is substantially justified requires only an examination of the record already developed in the proceedings. No additional discovery or evidentiary hearings are necessary. In contrast, if a court were to follow the approach urged by petitioners, it would be forced to undertake a protracted analysis of the position advanced by the government in the fee phase of the litigation. Such an inquiry would run afoul of EAJA because it would require a court to consider in isolation evidence concerning the fee litigation stance of the government.

To make such an inquiry in the present case the district court would need to determine whether the government's position in the fee litigation (as opposed to its position in the underlying litigation or in the agency action which gave rise to the litigation) was substantially justified. At a minimum, the court would need to consider the government's justification for opposing respondents' fees for their work before this Court on the appeal relating to the underlying action, and also to examine the government's justification for arguing that respondents failed to quantify the fees due to an increase in the cost of living and that certain matters, including the pro bono publico nature of the litigation, should

not have been included as factors enhancing respondents' fee award. (See Petitioners Br. at 19-20.) Such an analysis would violate EAJA and escalate the litigation over fees into a major litigation in itself.

B. The Policies Embodied By EAJA Favor Awarding Fees For Fee Litigation Without Determining Whether The Government's Opposition to the Fee Was Substantially Justified.

Allowing prevailing parties an award of fees for fee litigation under EAJA is "consistent with the purpose of [fee-shifting] statutes to ease litigants' path in vindicating their legal rights." McDonald v. Secretary of Health and Human Services, 884 F.2d 1468, 1480 (1st Cir. 1989). See also Trichilo I, 823 F.2d at 707. Allowing those same parties to

recover reasonable fees for the fee litigation, without a separate inquiry into whether the government's position is substantially justified, also fulfills EAJA's purposes because such awards help equalize the respective resources of prevailing fee applicants and the government, and do not put EAJA fee applicants to the additional burden of becoming captive in ancillary proceedings concerning the stance of the government in the fee litigation.

Allowing the government to proliferate fee litigation while avoiding responsibility to pay fees therefor, after it has been determined that its position in the underlying action was not substantially justified, would dilute the remedial purposes of EAJA. "Since the

purpose of the EAJA is to remove counsel fees as an impediment to challenging unreasonable and unjustified governmental actions, where a governmental action has been shown to have been unjustified, there should be as little disincentive for plaintiffs to obtain attorney's fees as there is for them to challenge the action itself." Trichilo I 823 F.2d at 707.

The alternative approach urged by petitioners would undermine the purposes of EAJA and penalize successful EAJA fee litigants by requiring them to absorb the cost of fee litigation, unless the government's fee stance was determined to be not substantially justified. In dismissing arguments similar to those

advanced by petitioners herein, the Second Circuit noted that

> [t]he government asks us "to treat the EAJA application as part of counsel's cost of doing business." To do so, however, would leave it in the power of the government, which already had been unjustified in its actions toward plaintiff, to so raise the cost of plaintiff's counsel's "doing business" simply by strenuous resistance to all fee applications as to discourage or economically prevent a plaintiff from litigating against the government in the first place. We regard it as more consistent with the congressional purpose to treat plaintiff's fee application as part of the government's cost of taking positions that are not substantially justified.

Id. See also Haitian Refugee Center v. Meese, 791 F.2d at 1500 ("The remedial purpose of EAJA is best served by considering the totality of prelitigation and litigation circumstances in awarding fees."); Note, "Determining Fees For Fees

Under the Equal Access To Justice Act: Accomplishing the Act's Goals," 9 Cardozo L. Rev. 1091, 1112-14 (1988).

Not only would the approach espoused by petitioner undermine the salutary remedial purposes of EAJA, but it would also prolong and proliferate the litigation. As the District of Columbia Circuit noted in Cinciarelli v. Reagan, requiring "every victorious EAJA plaintiff to make a separate claim for fees for bringing the first EAJA suit, and permit[ting] the government to claim that its first EAJA defense was substantially justified on the merits" raises "the distinct possibility of an infinite regression of EAJA litigation." 729 F.2d at 810. This would violate this Court's instruction that "a 'request for attor-

ney's fees should not result in a second major litigation.'" Pierce v. Underwood, 108 S. Ct. at 2549.

A very heavy burden would be placed on parties such as respondents and on the many counsel and organizations, such as amici, who undertake public interest litigation, by the prospect of not being compensated for work on the fee application. Such a rule would also discourage many counsel from accepting cases challenging arbitrary government conduct. Counsel which typically take on such litigation have considerably less resources than the government and are very likely to be harmed by prolonged litigation over fee matters. In contrast, the government has much to gain and little to lose from extending such

litigation. As Justice Brennan noted in the similar context of fees for civil rights litigation:

> Within the confines of individual cases, from prevailing plaintiffs' point of view, appellate litigation of attorney's fee issues increases the delay, uncertainty, and expense of bringing a civil rights case, even after the plaintiffs have won all the relief they deserve. Defendants -- who generally have deeper pockets than plaintiffs or their lawyers, and whose own lawyers may well be salaried and thus have lower opportunity costs than plaintiffs' counsel -- have much to gain simply by dragging out litigation. The longer litigation proceeds, with no prospect of improved results, the more pressure plaintiffs and their attorneys may feel to compromise their claims or simply to give up.

Hensley v. Eckerhart, 461 U.S. 455-56 (Brennan, J., concurring in part and dissenting in part).

The government's assertion (Br. at 29-30) that there is no real possibility of such prolonged wrangling over fees is belied by the circumstances of this case, where the fee litigation has already lasted seven years. Requiring counsel to undergo yet another round of litigation would discourage many from undertaking the representation of plaintiffs in similar public interest litigation. As the district court noted below, counsel typically undertake public interest litigation such as this not merely to "vindicate [plaintiffs'] rights to fair process and equal treatment", but also to "vindicate . . . important public interests." Louis v. Nelson, 646 F. Supp. 1300, 1317-18 (S.D.Fla. 1986). Such purposes are squarely within the

ambit of EAJA and should not be undermined by requiring counsel to face and possibly to fund unending squabbles over fee matters.

II

CONCLUSION

The Court should affirm the decision of the Court of Appeals in this case and adopt a rule which would allow successful EAJA fee applicants to obtain fees for fee litigation without having to face the additional hurdle of an inquiry into whether the government's position in the fee litigation was substantially justified.

Respectfully submitted,

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